UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BNC NORTHWEST PSYCHIATRIC HOSPITAL, LLC d/b/a BROOKE GLEN BEHAVIORAL HOSPITAL,

Respondent

and

Case Nos. 04-CA-164465
04-CA-174166

BROOKE GLEN NURSES ASSOCIATION/ PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS,

Charging Party

EXCEPTIONS OF CHARGING PARTY TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Charging Party, Brooke Glenn Nurses Association/Pennsylvania Association of Staff Nurses and Allied Professionals ("Union" or "Charging Party"), by and through its attorneys, Markowitz & Richman, and pursuant to Section 102.46(a) of the Board's Rules and Regulations, hereby excepts to the October 5, 2016 decision ("Decision") issued by the Administrative Law Judge ("ALJ") in the above-captioned matter.

More specifically, the Charging Party excepts to:

1. The ALJ's exclusion of a variety of evidence at hearing on grounds of relevance.
2. The failure of the ALJ to make certain findings of fact established in the record.
3. The ALJ's statement at page 6, line 28 of the Decision that DiGiacomo had handbilled on behalf of the Union at Friends Hospital "about a year and a half before" November 12, 2015.

4. The ALJ's articulation at page 8, lines 40-42 to page 9, lines 1-3 of the Board's doctrine permitting a union to choose its bargaining representatives.
5. The finding of the ALJ at page 9, line 5 of the Decision that the facts in this case illustrate the potential for mischief and serious interference with good faith bargaining.
6. The finding of the ALJ at page 9, lines 12-13 of the Decision that the decision by the Union to bring members of another labor organization to bargaining on November 10, 2015 injected a tangential and corrosive element in the bargaining.
7. The finding of the ALJ at page 9, footnote 12 of the Decision that the cases cited by the General Counsel and Charging Party in their brief with regard to the right of the Charging Party to bring members of another labor organization to bargaining were inapposite.
8. The finding of the ALJ at page 9, lines 28-29 of the Decision that the Respondent's actions on November 10, 2015 "did not rise to the level of an unfair labor practice within the meaning of the Act."
9. The failure of the ALJ to find that the Respondent's actions on November 10, 2015 violated Sections 8(a)(5) and (1) of the Act.
10. The finding of the ALJ at page 9, line 30 through page 10, line 1 of the Decision that the Employer's actions on November 10, 2015 were "an isolated event that was mooted by the Respondent's good faith acceptance of the presence of the observers the next day."
11. The finding of the ALJ at page 10, footnote 13 of the Decision that the Respondent's actions at the November 10, 2015 bargaining session were cured the very next day.
12. The finding of the ALJ at page 10, lines 6-8 of the Decision that even if the Respondent had "committed a technical violation of Section 8(a)(5) by cancelling the November 10 bargaining session, there is no need for a remedial order for that violation."

13. The finding of the ALJ at page 10, line 15 of the Decision that events subsequent to November 10, 2015 made a remedy unnecessary.
14. The finding of the ALJ of the ALJ at page 10, lines 16-18 of the Decision that a scenario similar to the one that occurred on November 10, 2015 when the Employer cancelled the bargaining session "is highly unlikely to occur in the future" and that "to require a notice posting and a cease and desist order in these circumstances would…create more tension and ill will than would letting things stand as they are."
15. The finding of the ALJ at page 11, lines 21-22 of the Decision that the General Counsel failed to satisfy "the initial burden of showing that the Respondent's discharge of [Elisa] DiGiacomo was motivated by her union or other protected activity."
16. The failure of the ALJ to find that the discharge of Elisa DiGiacomo by the Employer was motivated by her union or other protected activity.
17. The failure of the ALJ to find that, but for her union or other protected activity, Elisa DiGiacomo would not have been terminated.
18. The finding of the ALJ at page 11, lines 27-29 of the Decision that there was "no credible evidence" that the Respondent's opposition to the Union "focused on DiGiacomo or could reasonably lead to the inference that her discharge was motivated by her union or protected activity."
19. The finding of the ALJ at page 11, footnote 16 of the Decision that the statements of Ellen Strauss and Bill Thomas were "too remote and attenuated to show that union or protected activity was a motivating factor in DiGiacomo's discharge."
20. The finding of the ALJ at page 12, lines 2-3 that the "strongest evidence in the General Counsel's case is that which is closer in time to the discharge" but that this evidence

"falls far short of showing that DiGiacomo's union or protected activity was a motivating factor in her discharge."

21. The finding of the ALJ at page 12, lines 3-8 that DiGiacomo's behavior at the November 10 and 11 bargaining sessions did not "evoke any significant adverse response from Respondent."
22. The finding of the ALJ at page 12, lines 17-19 of the Decision that "…there are no allegations that Respondent engaged in threats or other acts of coercion in violation of Section 8(a)(1) of the Act."
23. The finding of the ALJ at page 12, lines 21-23 of the Decision that "the real motivating factor for the discharge [of DiGiacomo] was an independent set of circumstances completely divorced from any union or other protected activity."
24. The finding of the ALJ at page 12, lines 23-24 of the Decision that DiGiacomo was engaged in misconduct and that her conduct was unprovoked.
25. The failure of the ALJ on page 12, lines 27-28 of the Decision to find that the General Counsel proved, as initial matter, that the discharge was motivated by DiGiacomo's union or other protected activity.
26. The ALJ's statement at page 12, lines 35-36 that "none of that testimony or documentary evidence provided details or context similar to what happened here."
27. The finding of the ALJ on page 12, lines 39-40 of the Decision that the "derogation of a superior in the presence of visitors shows a serious problem that is qualitatively different from the comparatives that the General Counsel alleges amount to disparate treatment."
28. The finding of the ALJ at page 12, line 41 to page 13, line 2 of the Decision that the "General Counsel has not shown that DiGiacomo was the subject of disparate treatment

or that such alleged disparate treatment showed that her discharge was discriminatorily motivated."

29. The finding of the ALJ at page 13, lines 5-7 of the Decision "that [the] Resondent has shown persuasively that it would have discharged DiGiacomo even in the absence of her protected activity because of her serious misconduct on November 12."
30. The statement of the ALJ at page 13, lines 14-15 that "[a]n employer need not put up with such insults that show blatant disregard for authority and proper decorum, especially in a hospital setting."
31. The finding of the ALJ at page 13, lines 15-18, of the Decision that it was "…reasonable for Mullen to determine, as she did, that DiGiacomo's misconduct…made DiGiacomo a bad risk for future interactions with patients or families."
32. The decision by the ALJ at page 13, lines 20-21 to reject the General Counsel's theory of a violation under the *Wright Line* analysis.
33. The finding of the ALJ at page 14, lines 6-7 of the Decision that the incidents on the afternoon of November 12, 2015 "did not involve protected concerted activity by DiGiacomo or anyone else."
34. The statement of the ALJ at page 14, lines 12-13 that "protected activity must be based on objective fact, not subjective perceptions of the party or witness making the claim."
35. The statement of the ALJ at page 14, footnote 19 that "the insults she hurled at DeShields…can hardly be called 'complaints about DeShields' role at the facility.'"
36. The finding of the ALJ at page 14, lines 15-17 of the Decision that it cannot "be persuasively shown that the tour and DiGiacomo's reaction to it were part of the *res*

gestae of her protected activity at the bargaining sessions of November 10 and 11 or the meeting with Nolet earlier on November 12."

37. The finding of the ALJ at page 14, lines 21-23 of the Decision that DiGiacomo's "reaction to the tour had nothing to do with her union or protected activity and everything to do with her injecting herself into something that did not involve her."
38. The finding of the ALJ at page 14, lines 28-29 of the Decision that even if he "were to apply the *Atlantic Steel* factors to DiGiacomo's misconduct," there would be no violation.
39. The ALJ's application of the *Atlantic Steel* factors at page 14, lines 29-35.
40. The finding of the ALJ at page 14, line 35 to page 15, line 1 of the Decision that "DiGiacomo's misconduct clearly outweighs any protected activity that was involved."
41. The ALJ's rejection, at page 15, lines 1-2 of the Decision of General Counsel's reliance on the *Atlantic Steel* theory of a violation.
42. The failure of the ALJ to find that DiGiacomo's discharge violated Sections 8(a)(3) and (1) of the Act.
43. The failure of the ALJ to find that DiGiacomo's discharged resulted from her union and other protected activities.

WHEREFORE, the Union urges the Board to: (a) reverse the Decision of the ALJ; (b) find that the Employer violated Sections 8(a)(5) and (1) of the Act by refusing to proceed with the November 10, 2015 bargaining session so long as the Union insisted on the presence of mental health technicians; (c) find that the Respondent discharged Elisa DiGiacomo because of her union and other protected activities in violation of Sections 8(a)(3) and (1) of the Act; and (d) order relief consistent with such findings.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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